Shalom D. Stone
STONE CONROY LLC
25A Hanover Road, Suite 301
Florham Park, NJ 07932
(973) 400-4181
Counsel for Plaintiffs

Andrew J. Pincus (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Plaintiffs

Alida Kass
NEW JERSEY CIVIL JUSTICE INSTITUTE
112 West State Street
Trenton, NJ 08608
(609) 392-6557
Counsel for Plaintiff New Jersey Civil Justice Institute

Steven P. Lehotsky (*pro hac vice*)
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
Counsel for Plaintiff Chamber of Commerce of the United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY CIVIL JUSTICE INSTITUTE and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Plaintiffs,

-against-

GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey,

Defendant.

Civil Action No. 3:19-cv-17518

District Judge Anne E. Thompson
Magistrate Judge Lois H. Goodman

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Motion Date: Feb. 3, 2020

Oral Argument Requested

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), to "promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). In accordance with that directive, the Supreme Court has repeatedly held that the FAA preempts state-law rules that target arbitration agreements for invalidation—including in the context of labor and employment relationships.

The State of New Jersey nonetheless recently enacted an amendment to the New Jersey Law Against Discrimination ("NJLAD") that purports to prohibit businesses and workers from entering into pre-dispute arbitration agreements. N.J.S.A. 10:5-12.7 ("Section 12.7") (App. 1). Specifically, Section 12.7 subsection (a) makes unenforceable any provision in an employment agreement that "waives any substantive or procedural right" under the state's Law Against Discrimination; and subsection (b) provides that "[n]o right or remedy under" the Law Against Discrimination "or any other statute or case law" may be "prospectively waived." N.J.S.A. 10:5-12.7(a)-(b) (App. 1).

Because the NJLAD and other state employment statutes provide that individuals have a right to sue in court for alleged violations of employment laws, Section 12.7's effect—if it were enforceable—would be to invalidate all employer-employee arbitration agreements. That is because the quintessential feature of an arbitration agreement is a mutual commitment by both parties to forgo litigation in

court in favor of cheaper, more efficient, bilateral arbitration of any disputes. Under Section 12.7, however, such agreements have been declared unenforceable as a matter of state law.

Plaintiffs—the New Jersey Civil Justice Institute ("NJCJI") and the Chamber of Commerce of the United States of America (the "Chamber")—include among their members many businesses operating in New Jersey that agree with their employees to use arbitration to resolve workplace-related disputes. These members—as well as many other New Jersey businesses—have long relied on arbitration to provide fair, quick, and efficient resolution of workplace disputes and eliminate the burdens to all parties of litigation in court. Enforcement of Section 12.7 as applied to arbitration would therefore cause irreparable harm to Plaintiffs and their members.

Plaintiffs are entitled to judgment as a matter of law because Section 12.7 is preempted by the FAA and therefore invalid under the Supremacy Clause of the United States Constitution. The effect of Section 12.7 is to prohibit all pre-dispute arbitration agreements in new or revised contracts of employment by making the right to sue in court and to receive a jury trial unwaivable. "[T]he primary characteristic of an arbitration agreement" is "a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). Section 12.7 therefore does exactly what the FAA prohibits: as Justice

Kagan explained in her opinion for the Court in *Kindred*, a state law is invalid when it "disfavor[s] contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426.

Plaintiffs meet the four-part test for issuance of a permanent injunction set forth in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). They satisfy the first two factors because Section 12.7 will inflict irreparable harm on Plaintiffs and their members in the absence of injunctive relief and there is no adequate remedy at law. Plaintiffs' members could not recover the significant administrative costs or the increase in dispute-resolution costs that will result if they are forced to comply with Section 12.7. Employers and workers who are forced into resolving their disputes through litigation in court would be deprived of the benefits of arbitration. And those members who do not comply with Section 12.7 based on the good-faith belief that the FAA protects their arbitration agreements risk enforcement actions by Defendant (and by private parties).

Plaintiffs also satisfy the third and fourth factors because the balance of the equities and the public interest both weigh heavily in favor of a permanent injunction. Defendant does not have any interest in enforcing an invalid law that flies in the face of the federal policy favoring arbitration embodied by the FAA—and therefore cannot claim any harm if an injunction were issued.

In sum, a permanent injunction against enforcement of Section 12.7 as applied to arbitration and a declaration that Section 12.7 is preempted by the FAA as applied to arbitration are both appropriate and necessary, and should be entered without delay.

STATEMENT OF FACTS

I. PLAINTIFFS' MEMBERS RELY ON ARBITRATION AGREEMENTS WITH THEIR WORKERS TO PROVIDE ALL PARTIES WITH THE BENEFITS OF ARBITRATION.

A. *Arbitration benefits businesses and workers alike.*

Arbitration is a faster, simpler, cheaper, and less adversarial mode of dispute resolution as compared to litigation in court. The Supreme Court has recognized "real benefits to the enforcement of arbitration provisions" in the employment context. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For example, the Court has observed, arbitration lowers the cost of dispute resolution because it is more efficient and uses simpler procedures. *See Concepcion*, 563 U.S. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). These "simpler procedural and evidentiary rules" reduce the burdens on both parties; arbitration "normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

"[A]llowing parties to avoid the costs of litigation" is "a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City*, 532 U.S. at 122-23. Moreover, the nation's largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. For example, the American Arbitration Association (AAA), the country's largest arbitration provider, instituted a task force comprised of worker and employer representatives that developed due process standards for employment arbitration more than two decades ago that remain in effect today. Am. Arbitration Ass'n, Employment Due Process Protocol, perma.cc/93NR-TXQP.

Because of its simplicity, arbitration provides a viable means of dispute resolution for workers who do not have access to legal counsel. *See* Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique*, Mercatus Working Paper; George Mason Legal Studies Research Paper No. LS 15-07, at 26 (Aug. 25, 2015), perma.cc/CV6Z-2V8E ("hiring an attorney *** is often unnecessary [in arbitration]"). And arbitration's features make it practicable for workers to assert claims in arbitration that they could not practically assert in court.

Empirical research confirms the benefits of arbitration. A recent study released by the Chamber's Institute for Legal Reform demonstrates that, in cases

decided on the merits, employees on average recovered *more money* in arbitration—and did so in less time than in litigation in court. *See* Nam Pham & Mary Donovan, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5-10 (May 2019), perma.cc/2P6Z-3Y56;[1] *see also* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

B. ***Employment arbitration in practice.***

Businesses, including Plaintiffs' members with operations in New Jersey, use arbitration to resolve workplace-related disputes so that the business and its workers can obtain the benefits of arbitration. Plaintiffs' Local Civil Rule 56.1 Statement ("Pl. St.") ¶¶ 26-28; Declaration of G. Spencer ("Spencer Decl.") ¶ 14; Declaration of A. Kass ("Kass Decl.") ¶ 12. Under the FAA, courts are required to enforce pre-dispute arbitration agreements so long as they are fair; accordingly, businesses can predict that they can resolve the overwhelming majority of workplace-related disputes through arbitration. Indeed, numerous New Jersey employment-law claims are currently subject to pending motions to compel arbitration brought by New

[1] Employee-Plaintiffs in arbitration received approximately double in monetary awards than those in litigation, averaging $520,630 in arbitration as compared to $269,885 in litigation. *Id.* at 6.

Jersey employers under pre-dispute arbitration agreements.[2] Because of pre-dispute arbitration agreements, businesses and workers can avoid the expense and complexity of litigation in court. Pl. St. ¶¶ 28, 32; Spencer Decl. ¶ 14; Kass Decl. ¶¶ 6, 11.

Because they anticipate regular use of arbitration, many employers shoulder the bulk of the costs of arbitration. Pl. St. ¶ 33. For example, under the AAA's Employment/Workplace Fee Schedule, an employee who files a dispute against an employer cannot be required to pay more than a filing fee capped at $300. Am. Arbitration Ass'n, Employment/Workplace Fee Schedule: Costs of Arbitration (Nov. 1, 2019), perma.cc/2F2U-N687. The employer pays all other expenses—including the case management fee of $750, a filing fee of $1,900 when the case is brought by the employee, and additional fees including the fee for renting a hearing room, and all expenses and compensation of the arbitrator. *Id*. Companies willingly bear these costs in return for predictable access to the arbitral forum under regularly-

[2] *See, e.g.*, Defendants' Motion to Compel Arbitration, *Argun v. Neiman Marcus Grp, et al.,* 2:19-cv-14548 (D.N.J. Aug. 21, 2019) (Dkt. 8-1) (motion to compel arbitration of NJLAD claim subject to a pre-dispute arbitration agreement); *Darrow v. Ingenesis, Inc.*, 2:19-cv-17027 (D.N.J. Sept. 13, 2019) (Dkt. 6-1) (motion to compel arbitration of New Jersey Conscientious Employee Protection Act claim subject to a pre-dispute arbitration agreement); Defendants' Motion to Compel Arbitration, *Hubbard v. Comcast Corp.,* 1:18-cv-16090 (D.N.J. Jan. 28, 2019) (Dkt. 5-2) (same).

enforced pre-dispute arbitration agreements. Pl. St. ¶ 33; Spencer Decl. ¶¶ 18-22; Kass Decl. ¶¶ 17-18.

In contrast to the pre-dispute arbitration agreements regularly used by Plaintiffs' members, post-dispute arbitration agreements are exceedingly rare. Pl. St. ¶ 28. That is so for a number of reasons. Once a particular dispute arises, parties "often have an emotional investment in their respective positions," built up over the course of the events that led to the dispute, that tend to skew the preferences of one party or another in favor of litigation in court instead of opting to arbitrate. Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol. J. 32, 37 (July 2012); *see also* Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 326 (2003). Litigants often feel that they "must avoid any and all actions that may signal weakness to the opposition"—which "includes desperate offers to settle, mediate, or arbitrate a dispute." David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 68 (2003). A "party that initially extends the offer to arbitrate runs the risk of appearing weak, especially if the other party rejects the offer." *Id*. at 68-69.

In addition, lawyers for one or both sides may have a financial incentive to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, lawyers may advise clients to choose a judicial forum that is really in the lawyers' own best interest rather than in the clients' interest. Thus, as one commentator has explained, post-dispute arbitration agreements "amount to nothing but a beguiling mirage" because once a dispute has arisen, the parties rarely agree to arbitration: they have acquired an emotional investment in the case and their lawyers have an interest in litigating in court. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008).

Finally, even if parties were willing to negotiate post-dispute arbitration agreements in some situations, it would not make economic sense for many businesses to continue to bear the costs of arbitration as well as the high litigation costs for court proceedings. Pl. St. ¶¶ 34-36; Spencer Decl. ¶ 20; Kass Decl. ¶¶ 17-18. The inevitable result of prohibiting pre-dispute arbitration agreements, therefore, will be to cause businesses to abandon employment arbitration altogether. *Id.*

II. SECTION 12.7.

A. *The provisions of Section 12.7.*

Against this backdrop, the Governor of New Jersey, on March 18, 2019, signed into law an amendment to the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-12.7 ("Section 12.7"), that purports to ban all pre-dispute arbitration agreements in new or revised contracts of employment entered into after that date. Pl. St. ¶¶ 3-4.

Specifically, Section 12.7 subsection (a) makes any provision in an employment agreement that "waives any substantive or procedural right" under the NJLAD unenforceable, and subsection (b) provides that "[n]o right or remedy under" the NJLAD "or any other statute or case law" may be "prospectively waived." N.J.S.A. 10:5-12.7(a)-(b) (App. 1).

The NJLAD permits private persons "aggrieved by a violation of the NJLAD," including Section 12.7, to initiate suit in New Jersey Superior Court, where "[a]ll remedies available in common law tort actions shall be available." N.J.S.A. 10:5-12.11. A prevailing plaintiff is entitled to attorneys' fees and costs. *Id.* Numerous other New Jersey employment statutes also provide the right to sue in court. *See, e.g.*, N.J.S.A. 34:19-5 (right to sue in court for violations of the Conscientious Employee Protection Act); N.J.S.A. 34:11-56a25 (right to sue in court for unpaid minimum wage); N.J.S.A. 34:6b-3 (right to sue in court for employment

discrimination related to individual's use of tobacco products); N.J.S.A. 34:11b-11 (right to sue in court for violation of Family Leave Act); N.J.S.A. 34:11d-5 (right to sue in court based on employer's failure to permit or pay earned sick leave); *see also* Pl. St. ¶ 8.

By declaring that none of these rights to sue in court may be waived prospectively, Section 12.7 prohibits all pre-dispute arbitration agreements in new or revised contracts of employment as a matter of state law. These provisions apply to "all contracts and agreements entered into, renewed, modified, or amended on or after the effective date" of March 18, 2019. 2019 NJ Sess. Law. Serv. Ch. 39 (West) (App. 1, 3); Pl. St. ¶ 5.

B. ***Enforcement of the NJLAD and Section 12.7.***

The NJLAD provides for both government and private enforcement.

First, individuals who allege an unlawful employment practice or unlawful discrimination may file verified complaints with the Division of Civil Rights in the Attorney General's Office. N.J.S.A. 10:5-13. Upon the filing of such a complaint, the Attorney General will "cause prompt investigation * * * in connection therewith." N.J.S.A. 10:5-14. The Attorney General may "engage in conciliation" and seek a settlement with the employer on the complainant's behalf (*id.*) or "proceed against any person in a summary manner in the Superior Court of New Jersey to compel compliance" with the NJLAD. N.J.S.A. 10:5-14.1.

The Office of the New Jersey Attorney General actively enforces the NJLAD. It announces findings of probable cause that employers violated the NJLAD on a regular basis.[3] The Attorney General has also urged the Congress of the United States to pass a federal ban on certain employment arbitration agreements. Press Release, N.J. Office of the Att'y Gen., *Attorney General Joins Multi-State Coalition Seeking End to Required Arbitration of Workplace Sexual Harassment Claims* (Feb. 12, 2018), perma.cc/D4WV-XP9U. And the Office has stated its intent to "step[] up its efforts" to enforce the NJLAD. *See* N.J. Office of the Att'y Gen., *Year in Review 2018*, at 13 (2018), perma.cc/SHM7-4YJT.

Second, any private person "aggrieved by a violation" of NJLAD, including the newly-added Section 12.7, may sue in Superior Court (N.J.S.A.10:5-12.11) and seek a jury trial (N.J.S.A.10:5-13). "All remedies available in common law tort actions shall be available." N.J.S.A.10:5-12.11. Any business that *attempts* to enforce an arbitration provision in violation of Section 12.7 will be held liable for the worker's attorneys' fees and costs. N.J.S.A. 10:5-12.9. Employers are also subject to increasing penalties for multiple violations of "any provisions" of the NJLAD. N.J.S.A.10:5-14.1a.

STANDARD OF REVIEW

[3] *See* Pl. St. ¶ 18.

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The movant must identify the "portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has done so, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Accordingly, it is "axiomatic that a [non-movant's] conclusory statements do not create an issue of fact." *Ma v. Westinghouse Elec. Co.*, 559 F. App'x 165, 169-70 (3d Cir. 2014) (quoting *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 985 (7th Cir. 1999)).[4]

ARGUMENT

Plaintiffs are entitled to judgment as a matter of law, because Section 12.7, as applied to arbitration, is preempted by the FAA. Moreover, plaintiffs easily satisfy all four factors for obtaining permanent injunctive relief.

---

[4] Rule 56(b) allows for the filing of a summary judgment motion "*at any time* until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b) (emphasis added). A plaintiff may therefore move for summary judgment before the defendant answers the complaint. *See, e.g.*, *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.*, 587 F. Supp. 1446, 1456 (D.N.J. 1984) (granting the plaintiff's pre-answer motion for partial summary judgment; rejecting the defendant's argument that motion was premature when version of Rule 56 in effect at that time permitted the plaintiff to move for summary judgment "after the expiration of 20 days from the commencement of the action"); *GE Grp. Life Assur. Co. v. Turner*, 2009 WL 150944, at *3 (W.D. Pa. Jan. 20, 2009) (similar).

I. PLAINTIFFS HAVE STANDING TO CHALLENGE SECTION 12.7.

A. *Plaintiffs have organizational standing because they are injured by Section 12.7.*

The constitutional requirements for standing are satisfied when a party suffers a concrete and particularized injury in fact that is caused by the conduct complained of and redressable by a decision in its favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). An organization meets standing requirements on its own behalf when it challenges a practice that harms its organizational activities and constitutes "a drain on the organization's resources." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Fair Hous. Rights Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 n.5 (3d Cir. 2016). Courts find organizational standing when, as here, a challenged law or action directly impedes an organization's ability to carry out its mission. *See, e.g.*, *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (collecting cases concluding that there was organizational standing "in a wide range of circumstances" in which a challenged law or action impedes an organization's activities and thus directly conflicts with the organization's mission).

The harms imposed by Section 12.7 as applied to arbitration directly impede Plaintiffs' missions. NJCJI's mission is to advocate for a civil justice system that treats all parties fairly and resolves disputes expeditiously and impartially. Pl. St. ¶ 4. A key element of that mission is to reduce the cost and improve the efficiency of

dispute resolution in New Jersey. *Id.* This mission is directly obstructed by Section 12.7's bar on pre-dispute arbitration agreements, because the provision would redirect cases from the more efficient and cost-effect arbitral forum into costlier, less efficient traditional litigation in court. Pl. St. ¶ 20. Section 12.7 is therefore squarely at odds with NJCJI's mission to work toward a more efficient civil justice system.

Section 12.7 as applied to arbitration similarly impedes the Chamber's mission. The Chamber, the world's largest business federation, advocates for pro-business policies on behalf of the business community and challenges anti-business government actions. Pl. St. ¶ 23. As part of that work, the Chamber routinely advocates in federal and state courts against legislative and regulatory actions that restrict businesses from entering into pre-dispute arbitration agreements. *Id.* Because Section 12.7 squarely prohibits businesses from entering into pre-dispute arbitration agreements as a matter of state law, it obstructs the Chamber's ability to promote pro-business policy and safeguard the ability of businesses with operations in New Jersey to enter arbitration agreements with their workers. Pl. St. ¶ 24. And, if it is allowed to stand, Section 12.7 will set a troubling precedent that impedes the Chamber's efforts to advocate on behalf of its members in other States. The Chamber has further had to divert resources from other advocacy efforts in order to vindicate the interests of its members located in New Jersey to enter into pre-dispute employment arbitration agreements. Pl. St. ¶ 25.

All of the above injuries are attributable to Section 12.7, which (as applied to arbitration) "directly conflicts" with Plaintiffs' missions. *Eschenbach*, 469 F.3d at 133. A declaratory judgment invalidating Section 12.7 with respect to arbitration agreements governed by the FAA would redress these injuries.

B. *Plaintiffs have associational standing to bring this suit on behalf of their members.*

In addition, Plaintiffs have associational standing to sue here. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.,* 528 U.S. 167, 181 (2000) (citation omitted). Plaintiffs' members have Article III standing to sue in their own right, because they suffer concrete and particularized injuries directly traceable to Section 12.7. *See Lujan,* 504 U.S. at 561.

Many of the Chamber's and NJCJI's members are directly subject to Section 12.7's prohibitions—because they are businesses in New Jersey that regularly enter into pre-dispute arbitration agreements with their workers, and that have continued to do so after March 18, 2019. Section 12.7 requires Plaintiffs' members either to forgo their federal right to contract to resolve disputes through arbitration as part of their relationship with workers or to face enforcement actions that would subject

them to increasing fines, costs, and attorney fees. N.J.S.A. 10:5-12.9; 14.1a. As entities directly subject to Section 12.7, they have standing to challenge the provision. *See Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 362 (3d Cir. 2014) ("'[W]hen an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing.'" (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983)); *see also Lujan*, 504 U.S. at 561 (explaining that if "the plaintiff is himself an object of the action * * * there is ordinarily little question that the [government] action" caused him injury).

Absent Section 12.7, New Jersey courts have regularly enforced pre-dispute arbitration agreements, including agreements requiring arbitration of claims brought under New Jersey's employment laws. *See, e.g.*, *Riley v. Raymour & Flanigan*, 2017 WL 4700157 (N.J. Super. Ct. App. Div. Oct. 20, 2017); *Bowman v. Raymours Furniture Co.*, 2016 WL 5096353 (N.J. Super. Ct. App. Div. Sept. 20, 2016); *Young v. Prudential Ins. Co.*, 297 N.J. Super. 605 (App. Div. 1997); *Singer v. Commodities Corp.*, 292 N.J. Super. 391 (App. Div. 1996); *Bleumer v. Parkway Ins. Co.*, 277 N.J. Super. 378 (App. Div. 1994). But now, Section 12.7 directs Plaintiffs' members to restructure their legal relationships with workers and forgo their federal rights to access the benefits of the arbitral forum.

Conversely, if Plaintiffs' members fail to make the changes to their practices required by Section 12.7 as a matter of state law, they face a serious threat of enforcement actions. *See Aichele*, 757 F.3d at 362-63 (holding political parties had standing to sue state attorney general to challenge constitutionality of statute regulating ballot access that was likely to be enforced against them and subject them to the threat of "litigation expenses" and "cost awards"). Some of Plaintiffs' members have continued to enter pre-dispute arbitration agreements after March 18, 2019. Pl. St. ¶ 26. In light of the facts that the Office of the Attorney General actively enforces the NJLAD against employers and has advocated banning arbitration of certain types of workplace claims altogether, it is virtually certain that Defendant intends to enforce Section 12.7 vigorously and prevent businesses from entering into pre-dispute arbitration agreements covered by the new law.

Accordingly, no matter how they respond to Section 12.7, Plaintiffs' members have suffered and will continue to suffer injury caused by the statute.

Finally, because Plaintiffs seek prospective declarative and injunctive relief, participation of their individual members in this lawsuit is not required. *See Hunt v. Wash. Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977) (recognizing association may seek declaratory, injunctive or other form of prospective relief on behalf of members).

II. SECTION 12.7 IS PREEMPTED BY THE FAA AND THEREFORE VIOLATES THE SUPREMACY CLAUSE.

As applied to arbitration agreements governed by the FAA, Section 12.7 is preempted and therefore invalid.

The Supremacy Clause directs that the "laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, any state law that "conflicts with § 2 of the Federal Arbitration Act * * * violates the Supremacy Clause." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (provision of California Corporations Code preempted); *see Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("The FAA's displacement of conflicting state law is 'now well-established.'"). Likewise, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in federal law, is preempted and invalid. *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Section 12.7 is preempted on both grounds.

The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam) (quotation marks omitted). Section 2 of the FAA specifies that a "written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,

* * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under Section 2, "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 563 U.S. at 339; *accord Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019). The Supreme Court therefore has repeatedly held that state laws disfavoring arbitration are preempted.[5]

Because Section 12.7 has the effect of banning a wide range of pre-dispute arbitration agreements by declaring them unenforceable and invalid under state law (*see* pages 9-10, *supra*), the provision violates Section 2 of the FAA. The U.S. Supreme Court has long held that labor and employment claims are arbitrable under the FAA and that the FAA preempts any state laws to the contrary. *Perry*, 482 U.S. at 491. A state law like Section 12.7 that "singl[es] out arbitration provisions for suspect status" by subjecting them to a rule of invalidity that does not apply to other

[5] *See, e.g.*, *Kindred*, 137 S. Ct. at 1426 (Kentucky state-law rule requiring specific express authorization in power-of-attorney before an attorney-in-fact could agree to arbitration on behalf of her principal); *Marmet*, 565 U.S. 530 (West Virginia law prohibiting arbitration of personal injury or wrongful death claims against nursing homes); *Preston,* 552 U.S. at 356 (California law granting the state labor commissioner, rather than an arbitrator, exclusive jurisdiction to decide an issue that the parties had agreed to arbitrate); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (Montana statute conditioning enforcement of arbitration agreements on special notice requirements); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (California Labor Code provision requiring judicial forum for wage collection actions); *Southland*, 465 U.S. at 10 (requirement that claims under California Franchise Investment Law be decided in court).

contracts therefore "directly conflicts with § 2 of the FAA." *Casarotto*, 517 U.S. at 687-88; *see also Kindred*, 137 S. Ct. at 1426-27 (FAA preempts a state-law rule that "fails to put arbitration agreements on an equal plane with other contracts" and "singl[es] out those contracts for disfavored treatment"). Accordingly, "under the Supremacy Clause, the state statute must give way." *Perry*, 482 U.S. at 491.

In addition, that the New Jersey statute here "avoid[s] referring to arbitration by name" does not in any way save it from scrutiny under the FAA. *Kindred*, 137 S. Ct. at 1426 (citing *Concepcion*, 563 U.S. at 341). As the U.S. Supreme Court recently reiterated, Section 2's "saving clause does not save defenses that target arbitration either by name *or by more subtle methods*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (emphasis added). The FAA preempts both any state law that "discriminates on its face against arbitration" *and* any rule "that covertly accomplishes the same objective by disfavoring contracts that * * * have the *defining features* of arbitration agreements." *Kindred*, 137 S. Ct. at 1423, 1426 (emphasis added). Simply put, any state law that relies "'on the uniqueness of an agreement to arbitrate as [its] basis'" and disfavors contracts with the "defining features of arbitration agreements" "thereby violate[s] the FAA." *Id.* at 1426 (quoting *Concepcion*, 563 U.S. at 341) (quoting in turn *Perry*, 482 U.S. at 493 n.9).

Section 12.7—like the state-law rule held preempted in *Kindred*—selects the "defining trait" of arbitration agreements, "a waiver of the right to go to court and to

receive a jury trial," and on the basis of that feature "impede[s]"—indeed, prohibits—businesses from entering into arbitration agreements with their workers. *Kindred*, 137 S. Ct. at 1427, 1429; *see Preston*, 552 U.S. at 354-59 (under same principles, holding FAA preempts law requiring initial resort to administrative adjudication). By prohibiting agreements that rely on the fundamental characteristics of arbitration, Section 12.7 "singles out arbitration agreements for disfavored treatment" and "flout[s] the FAA's command to place those agreements on equal footing with all other contracts" in violation of the FAA. *Kindred*, 137 S. Ct. at 1425, 1429; *see also Concepcion*, 563 U.S. at 341-42, 344, 354 (recognizing that state-law rules requiring "disposition by a jury," "judicially monitored discovery," or application of "the Federal Rules of Evidence" are all "obvious illustration[s]" of rules that would be preempted by the FAA—even if they purport to apply "to 'any' contract"—because such rules "[i]n practice * * * have a disproportionate impact on arbitration agreements" and "interfere[] with fundamental attributes of arbitration").

Simply put, Section 12.7 runs afoul of the Supreme Court's admonition that states may not subject arbitration agreements, "by virtue of their defining trait, to uncommon barriers." *Kindred*, 137 S. Ct. at 1427.

III. THE COURT SHOULD PERMANENTLY ENJOIN THE ATTORNEY GENERAL FROM ENFORCING SECTION 12.7 WITH RESPECT TO AGREEMENTS COVERED BY THE FAA.

Federal courts sitting in equity have the power to enter a permanent injunction against unlawful acts by state officials. *Allegheny Cty. Sanitary Auth. v. E.P.A.,* 732 F.2d 1167, 1174 (3d Cir. 1984) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). "A plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief" by showing: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-157 (2010) (quoting *eBay*, 547 U.S. at 391); *see also TD Bank N.A. v. Hill*, 928 F.3d 259, 278 (3d Cir. 2019) (applying the *eBay* standard).

Plaintiffs here satisfy all four elements.

A. *Section 12.7 causes Plaintiffs and their members ongoing irreparable injury for which there is no adequate remedy at law.*

Plaintiffs and their members satisfy the first and second prongs of the *eBay* standard because they are suffering an ongoing, irreparable injury that lacks an adequate remedy at law. *See Ne. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 442 (3d Cir. 2019) (explaining the first two elements

"'typically constitute two sides of the same inquiry'" (quoting *TD Bank*, 928 F.3d at 282)); *see also* pages 13-17, *supra*. Without a permanent injunction, Plaintiffs' members face the imminent threat that the New Jersey Attorney General will enforce Section 12.7 against their use of arbitration unless they comply with a federally preempted state law. When entities face a "Hobson's choice" to either continually violate unlawful legislation and expose themselves to increasing liability, or "violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings," they are entitled to injunctive relief. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

That is the choice Plaintiffs' members face here. On the one hand, Plaintiffs' members can continue to violate Section 12.7 by using arbitration, but they would then face the potential for multiple enforcement suits and the risk of increasing fines with each violation. N.J.S.A. 10:5-12.9, 12.11, 12.14a.

The alternative is equally unpalatable. Plaintiffs' members could violate Section 12.7 once and raise their challenge to the validity of Section 12.7 in any ensuing litigation. But in the meantime, they would suffer injury from otherwise complying with the unlawful state law while that challenge is pending. Compliance with Section 12.7 requires Plaintiffs' members to restructure their contractual relationships with employees, lose access to the more efficient arbitral forum, and increase their associated litigation costs. *See* pages 15-16, *supra*.

These changes will result in fewer arbitration agreements being formed, and more disputes being channeled into judicial and administrative, rather than arbitral, forums. Plaintiffs' members would be deprived of the benefits and cost savings of arbitration whenever disputes arise and must be resolved in the slower and more expensive court system, sometimes with a protracted administrative proceeding as a prelude in order to meet statutory requirements. And businesses, including Plaintiffs' members, are likely to experience a spike in the filing of meritless lawsuits, as some members of the plaintiffs' bar may try to obtain windfall settlements for baseless claims for which the settlement value stems solely from the high costs of litigating in court. Pl. St. ¶ 31.

To receive "full relief," Plaintiffs' members must be able to enter, revise, and enforce arbitration agreements without the cloud of sanctions imposed by Section 12.7 hovering over them. *Ne. Pa. Freethought Soc'y*, 938 F.3d at 442.

None of these costs can be remedied by monetary damages—and therefore there is no remedy adequate at law—because an action for damages is barred by sovereign immunity. *See, e.g.*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds by Douglas v. Indep. Living Ctr. of S. Cal, Inc.*, 565 U.S. 606 (2012); *see also Odebrech Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity

renders the harm suffered irreparable"); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) ("where, as here, the plaintiff in question cannot recover damages from the defendant due to the defendant's sovereign immunity * * * any loss of income suffered by a plaintiff is irreparable *per se*.").

In short, because Plaintiffs' members must choose between risking enforcement actions or complying with an invalid law that requires them to alter their relationships with their workers and incur significant costs, "a very real penalty attaches" regardless of how the members proceed. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009). In either case, the irreparable harm is clear, and can be avoided only if enforcement of Section 12.7 is enjoined as applied to arbitration.

B. *The balance of hardships and the public interest weigh sharply in Plaintiffs' favor.*

The inquiry into the balance of the hardships and the public interest merge where the government is an opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also, e.g.*, *Miller v. Sessions*, 356 F. Supp. 3d 472, 485 (E.D. Pa. 2019) ("taking the third and fourth factors together" in applying the *eBay* standard and entering a permanent injunction against the U.S. Attorney General). Both factors strongly support issuing an injunction here.

Enforcement of Section 12.7 deprives businesses and their workers alike of the many benefits of arbitration. The Supreme Court has repeatedly recognized that

"enforcement of arbitration provisions" yields "real benefits," *Circuit City*, 532 U.S. at 122-23, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); *accord Allied-Bruce*, 513 U.S. at 280 (one of arbitration's "advantages" is that it is "cheaper and faster than litigation") (quotation marks omitted).

Arbitration is also procedurally simpler, which reduces the burdens on both parties. Indeed, arbitration's simplified procedures often allow individuals to proceed without a lawyer. *See, e.g.*, Johnston & Zywicki, *supra*, at 25-26. This aspect of arbitration is particularly beneficial to employees with smaller claims, such as a dispute over a small amount of unpaid overtime.

As noted above, a recent study demonstrated that, in cases decided on the merits, employees on average recovered *more*—and in less time—in arbitration than they did in court. *See* Pham & Donovan, *supra*, at 5-10. Earlier scholarship similarly concluded that employees succeed more often in arbitration than in court. *See* David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1568-69 (2005) (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is only 12% to 15%) (citing Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29

(1998)) (of dispositive motions granted in court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004) (concluding that employees were 19% more likely to win in arbitration than in court), perma.cc/MY2P-PBUT.

The public therefore has a powerful interest in preventing businesses and their workers from being deprived of the benefits of arbitration—all the more because those benefits are protected under federal law.

In stark contrast, Defendant will suffer *no* harm if an injunction issues. As applied to arbitration, Section 12.7 is preempted by the FAA, and the public interest is always served by enjoining the enforcement of an invalid state law. As the Third Circuit has put it, "we state the obvious by noting that the public interest is not disserved by" a permanent injunction forbidding enforcement of unconstitutional policy. *Ne. Pa. Freethought Soc'y*, 938 F.3d at 442; *see also, e.g.*, *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.") (quotation marks omitted); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (public interest favors preliminarily enjoining state statutes likely to be held unconstitutional).

The bottom line is that New Jersey has no valid interest in interfering with rights protected by federal law. *Chamber of Commerce of the United States v.*

Edmondson, 594 F.3d 742, 771 (10th Cir. 2010) ("[T]he public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.") (quoting *Bank One v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999)). And because the requested injunction is limited to arbitration agreements covered by the FAA (Compl. ¶ 29 & Prayer for Relief (B)), Defendant would not be prevented from enforcing Section 12.7 outside of that context. Finally, if any particular arbitration agreement is actually unfair to workers, it can be invalidated under normal unconscionability principles. *See Kindred*, 137 S. Ct. at 1426.

In sum, the case for an injunction here is compelling.

CONCLUSION

This Court should grant Plaintiffs' Motion for Summary Judgment and (i) enter a declaratory judgment that Section 12.7 of the NJLAD is invalid as applied to arbitration agreements covered by the FAA; and (ii) permanently enjoin the Attorney General of New Jersey from enforcing Section 12.7 with respect to such arbitration agreements.

Respectfully submitted,

Dated: January 7, 2020

/s/ Shalom D. Stone

Shalom D. Stone
STONE CONROY LLC
25A Hanover Road, Suite 301
Florham Park, NJ 07932
(973) 400-4181

Counsel for Plaintiffs

Andrew J. Pincus (*pro hac vice*)
Archis A. Parasharami (*pro hac vice*)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Plaintiffs

Alida Kass
NEW JERSEY CIVIL JUSTICE INSTITUTE
112 West State Street
Trenton, NJ 08608
(609) 392-6557
Counsel for Plaintiff New Jersey Civil Justice Institute

Steven P. Lehotsky (*pro hac vice*)
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
Counsel for Plaintiff Chamber of Commerce of the United States of America

Appendix

New Jersey Statutes Annotated
Title 10. Civil Rights
Chapter 5. Law Against Discrimination (Refs & Annos)

N.J.S.A. 10:5-12.7

10:5-12.7. Restrictions on waiver of substantive or procedural rights or remedies relating to claims of discrimination, retaliation, or harassment

Effective: March 18, 2019
Currentness

a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.

b. No right or remedy under the "Law Against Discrimination," P.L.1945, c. 169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived.

c. This section shall not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees.

Credits
L.2019, c. 39, § 1, eff. March 18, 2019.

Editors' Notes

APPLICATION

<For application of L.2019, c. 39 to contracts and agreements entered into, renewed, modified, or amended on or after March 18, 2019, see § 6 of that act.>

2019 Electronic Update

ASSEMBLY APPROPRIATIONS COMMITTEE STATEMENT WITH COMMITTEE AMENDMENTS

Senate Bill No. 121 (First Reprint)--L.2019, c. 39

DATED: JANUARY 28, 2019

The Assembly Appropriations Committee reports favorably Senate Bill No. 121 (1R), with committee amendments.

As amended, this bill would bar provisions in employment contracts that waive certain rights or remedies. It would also bar certain agreements that conceal details relating to discrimination claims.

Under the bill, a provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment would be deemed against public policy and unenforceable.

The bill provides that no right or remedy under the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.) or any other statute or case law could be prospectively waived.

The above provisions of the bill would not apply to the terms of any collective bargaining agreement between an employer and the collective bargaining representative of the employees.

The bill also provides that a provision in any employment contract or agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment, would be deemed against public policy and unenforceable. The bill applies to non-disclosure agreements; makes the non-disclosure provisions unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable; and requires that every settlement agreement resolving a discrimination, retaliation, or harassment claim by an employee against an employer include a notice that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision is unenforceable against the employer if the employee publicly reveals sufficient details so that the employer is reasonably identifiable.

As amended, the bill does not prohibit an employer from requiring an employee to sign a contract in which: (1) the employee agrees not to enter into competition with the employer during or after employment; or (2) the employee agrees not to disclose proprietary information, which includes only non-public trade secrets, business plan and customer information.

Under the bill, a person who enforces or attempts to enforce a provision deemed against public policy and unenforceable would be liable for the employee's reasonable attorney fees and costs.

The bill provides that no person shall take any retaliatory action, including but not limited to failure to hire, discharge, suspension, demotion, discrimination in the terms, conditions, or privileges of employment, or other adverse action, against a person, on grounds that the person does not enter into an agreement or contract that contains a provision deemed against public policy and unenforceable pursuant to the bill.

Under the bill, any person claiming to be aggrieved by a violation of the bill may initiate suit in Superior Court. An action would be required to be commenced within two years next after the cause of any such action shall have accrued. All remedies available in common law tort actions would be available to prevailing plaintiffs, in addition to the remedies provided by the bill. A prevailing plaintiff would be awarded reasonable attorney fees and costs.

The bill would take effect immediately and apply to all contracts and agreements entered into, renewed, modified, or amended on or after the effective date.

As reported, this bill is identical to Assembly Bill No. 1242 (1R), as amended and reported by the committee on this date.

COMMITTEE AMENDMENTS:

The committee amendments clarify that the bill does not prohibit an employer from requiring an employee to sign a contract in which: (1) the employee agrees not to enter into competition with the employer during or after employment; or (2) the employee agrees not to disclose proprietary information, which includes only non-public trade secrets, business plan and customer information.

FISCAL IMPACT:

This bill has not been certified as requiring a fiscal note.

N. J. S. A. 10:5-12.7, NJ ST 10:5-12.7
Current with laws through L.2019, c. 268 and J.R. No. 22

End of Document